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SUPREME COURT, U. S.

No. 71-55

In the Supreme Court of the United States

OCTOBER TERM, 1971

JACK MACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Rule involved	2
Statement	2
Argument	7
Conclusion	9

CITATIONS

Cases:

Haggard v. *United States*, 369 F. 2d 968 certiorari denied, 386 U.S. 1023	8
Ingram v. *United States*, 272 F. 2d 567	8
Kotteakos v. *United States*, 328 U.S. 750	8
McElroy v. *United States*, 164 U.S. 76	8
Wiley v. *United States*, 277 F. 2d 820 certiorari denied, 364 U.S. 817	8
Williamson v. *United States*, 310 F. 2d 192	8

Statute and Rule:

18 U.S.C. 2	2
18 U.S.C. 2314	2
18 U.S.C. 4208	3
Rule 8(b), Fed.R.Crim.P.	7

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-451

JACK MACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1971. The petition for a writ of certiorari was filed on September 29, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, under Rule 8(b) Fed.R.Crim.P., petitioner was properly joined with his co-defendants.

RULE INVOLVED

Rule 8(b), Fed.R.Crim.P. is as follows:

> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on two counts of an indictment charging him, together with Daniel Mondavano, Alfred Sarno, Robert Cardillo, Joseph LaMattina, John Hirschfeld and Carl Mastrototoro, with having transported and caused the transportation of stolen securities in interstate commerce in violation of 18 U.S.C. 2314 and 2.[1] He was sentenced to fifteen years' imprisonment

[1] On November 13, 1970, Mandavano pled guilty to three counts of the indictment. The others were scheduled to be tried with petitioner except Cardillo, who had a conflicting court commitment. LaMattina failed to appear for the trial. Hirschfeld was found guilty on the one count of the indictment.

subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed without opinion.

The indictment contained four counts. Petitioner was named as a defendant in the last three. The first count charged Mondavano, Sarno, Cardillo, and LaMattina with having transported and caused the transportation of $50,000 of stolen Jefferson, Ohio School District bonds from Boston to Baltimore on or about April 16, 1968. The second count charged petitioner, Mondavano, LaMattina and Hirschfeld with having transported and caused the transportation of a stolen $100,000 United States Treasury note from New York to Baltimore on or about May 1, 1968. The third count charged petitioner, Mondavano and LaMattina with having transported and caused the transportation of $153,000 of stolen United States Treasury bills and notes from New York to Baltimore on or about May 14, 1968. The fourth count charged petitioner, Mondavano and Mastrototoro with having transported and caused the transportation of three stolen $100,000 United States Treasury bills from New York to Baltimore on or about May 17, 1968.[2]

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in which he was charged. The jury was unable to reach a verdict as to Sarno and Mastrototoro and a mistrial was declared as to them.

[2] After all the evidence had been presented, the trial judge ruled that the second and third counts merged because the proof indicated that the $100,000 note charged in count two and the $153,000 of bills and notes charged in count three had all been transported from New York to Baltimore at the same time. Only the first, second and fourth counts were therefore submitted to the jury (Tr. 1330). Petitioner was convicted on counts two and four.

Vincent Teresa, who had been previously convicted and sentenced to twenty years' imprisonment for the interstate transportation of the same stolen securities involved in this case, testified that all of the stolen securities described in the four counts of the indictment were transported to two Baltimore businessmen, Joseph Schwartz and Stuart Harrison, to be negotiated by them. Teresa met Schwartz early in 1968 in London at a crap game in Teresa's hotel suite where Schwartz had lost a considerable amount of money (Tr. 476-477, 765-768). Teresa later learned that Schwartz was a wealthy builder and thought that his friendship could prove to be profitable. Accordingly, Teresa and Mondavano, an associate of Teresa in the Esquire Sportsmen's Club,[3] visited Schwartz in Baltimore early in February of 1968. While in Baltimore Schwartz introduced them to Harrison, an insurance broker whom Schwartz desired to help financially (Tr. 238-245, 772-774).

Teresa and Schwartz considered forming a partnership to build a gambling casino and hotel in Haiti. Teresa, Schwartz and Harrison flew to Miami and planned to continue on to Haiti to examine possible construction sites. However, because of political unrest in Haiti the trip there was cancelled. While in Miami, Harrison lost over $9,000 in a crap game. Schwartz paid Harrison's gambling losses (Tr. 255-259, 478-479, 773-778). Teresa and Schwartz considered building another hotel and casino on the

[3] The Esquire Sportsmen's Club was used to operate gambling junkets and as a conduit for funds from illegal activities.

island of Curacao. They met in London with Geoffrey Brietner, the developer of the property on the island, to discuss the transaction. Later in Baltimore, Teresa and Mondavano conferred with Schwartz about the Curacao investment. Teresa advised Schwartz that he would send him money to help defray the expenses of putting the deal together. They agreed that Harrison would handle Schwartz' side of the negotiations (Tr. 266, 692-706, 805-810).

In mid-April of 1968, Teresa sent Mondavano to Baltimore with $50,000 of stolen Jefferson, Ohio School District bonds. Teresa obtained these bonds from Cardillo and Sarno, two "fences" in Boston. Thereafter, Harrison obtained a $30,000 loan from the Union Trust Co. of Maryland using these bonds as collateral. Both Harrison and Schwartz testified that they did not know the bonds were stolen. Both testified that it was their understanding that Teresa was making these loans through Harrison and leaving the money with him to provide Teresa's share of the investment in the Curacao venture (Tr. 782-788, 259-261, 520-529).[4]

On May 1, 1968, the second set of stolen securities—$253,000 worth of U.S. Treasury bills and notes—was transported to Baltimore. These bonds were obtained from petitioner and Tortorello in New York

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[4] Teresa's testimony conflicted with Harrison's on this point. Teresa testified that he had obtained the bonds in a gambling game, that the owner wanted the bonds to be cashed secretly and that if Harrison would negotiate the bonds, he could retain $12,000 to repay Schwartz for money which Schwartz had advanced to Harrison for a gambling loss which Harrison had incurred during the Miami trip (Tr. 780-782, 787).

by Mondavano and Hirschfeld, two of Teresa's associates in the Esquire Sportsmen's Club, and delivered by them to Harrison in Baltimore (Tr. 790-798, 801-803). Teresa paid nothing in advance for the securities, but agreed to remit twenty percent of the proceeds to petitioner after the bonds were negotiated.

Harrison used these notes to secure large loans from the Union Trust Co. of Maryland. He retained $18,000 of the proceeds and delivered the remainder to Mondavano and Hirschfeld. Harrison and Schwartz both testified that they understood that Harrison was to keep this $18,000 in connection with the Curacao venture (Tr. 263-265, 490-492, 527-530).

In the middle of May, Teresa purchased three more stolen $100,000 United States Treasury notes from petitioner and Tortorello. Tortorello insisted on part payment in advance for these notes. Teresa borrowed $25,000 from Mastrototoro to make this payment (Tr. 823-832). On May 17, 1968, Mondavano, on Teresa's behalf, took the $25,000 to petitioner in New York, picked up the bonds and delivered them to Harrison in Baltimore (Tr. 494, 588-589, 832). Harrison gave the bonds to Schwartz who took them to Las Vegas to be cashed. Schwartz testified that he believed Teresa had sent him the notes in connection with the Curacao venture and that the sole reason he took the bonds to Las Vegas was to avoid an expensive tax audit which would inevitably ensue if they were cashed in Baltimore. At Caesar's Palace in Las Vegas the notes were discovered to be stolen. (Tr. 266-273, 439-445).

ARGUMENT

Petitioner's sole contention is that he was improperly joined with his co-defendants under Rule 8(b), Fed.R.Crim.P. The evidence, set forth above, clearly demonstrated a continuing relationship between Schwartz and Harrison on the one hand, and Teresa and his associates on the other. All of the securities were to be negotiated through Harrison and Schwartz, and the pretense used for cashing the bonds was in each instance to provide Teresa's share of the investment in the hotel and gambling casino on the island of Curacao. In each case, Teresa obtained the bonds through a "fence" and sent Mondavano to Baltimore to deliver them to Harrison and Schwartz. All but $50,000 worth of the securities delivered to Baltimore by Mondavano at Teresa's behest were obtained from petitioner. Under these circumstances it was proper for petitioner to be jointly indicted on counts two, three and four with Mondavano and LaMattina (who was indicted on all counts) as well as with defendants Sarno and Cardillo—who were indicted with Mondavano and LaMattina in count one. For the same reason, the joint trial of petitioner, charged in counts two, three, and four of the indictment, with the defendants charged only in count one, was also proper under Rule 8(b), Fed.R.Crim.P.[5] See,

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[5] Additionally, no prejudice resulted from the joinder which would have warranted severance pursuant to Rule 14, Fed. R.Crim.P. The trial judge took care to advise the jury to consider each defendant and each count separately (Tr. 1319). The evidence concerning the first set of bonds was not introduced against petitioner (Tr. 234). The fact that the jury

e.g., *Haggard* v. *United States*, 369 F. 2d 968 (C.A. 8), certiorari denied, 386 U. S. 1023; *Wiley* v. *United States*, 277 F. 2d 820 (C.A. 4), certiorari denied, 364 U. S. 817.

Petitioner's reliance on this Court's decisions in *McElroy* v. *United States*, 164 U. S. 76, and *Kotteakos* v. *United States*, 328 U. S. 750, as well as the Fourth Circuit decision in *Ingram* v. *United States*, 272 F. 2d 567, is misplaced. Those cases are distinguishable: there no showing was made, as here, of a continuing series of transactions connecting the defendants charged in the various counts of the indictment. Moreover, here as in *Williamson* v. *United States*, 310 F. 2d 192 (C.A. 9), the conduct upon which each of the counts was based was part of a series of factually related transactions in which all of the defendants participated, and thus the charges were properly joined, although the various offenses were distinct and all defendants were not charged in each count. See 310 F. 2d at 197 n. 16, and cases cited.

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convicted petitioner and Hirschfeld but could not reach a verdict as to Sarno and Cardillo shows that the jury distinguished among the different defendants during its deliberations. Moreover, the same evidence could have been admitted if petitioner had been tried alone. Although petitioner did not supply the first set of securities on April 16, 1968, evidence concerning the transportation and negotiation of these securities helped to show the history of the relationship between Harrison, Schwartz and Teresa and his associates, and to explain how and why the second and third set of securities—which were supplied by petitioner—were transported to Baltimore to be negotiated.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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